85-1384

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

NO. 85–1387

WILLIAM R. TURNER, et al.,
Employees of the Department of Corrections and Human Resources for the State of Missouri,
Petitioners,

v.

LEONARD SAFLEY, et al., MARY WEBB, et al., individually and as a class of similarly situated people,
Respondent.

DR. LEE ROY BLACK, et al.,
Employees of the Department of Corrections and Human Resources for the State of Missouri,
Petitioners,

v.

LEONARD SAFLEY, et al., MARY WEBB, et al., individually and as a class of similarly situated people,
Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER OF ARKANSAS, CALIFORNIA, IOWA, NEBRASKA, NORTH CAROLINA, NORTH DAKOTA, SOUTH CAROLINA, SOUTH DAKOTA AND VIRGINIA

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QUESTION PRESENTED

Whether the lower court erred in applying the strict scrutiny standard of *Procunier v. Martinez* to a prison regulation which prohibits correspondence between inmates who are not members of an immediate family?

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The undersigned states submit this brief as Amici Curiae in support of the Petitioner. The Amici urge that the decision of the United States Court of Appeals for the Eighth Circuit in these proceedings, *Safley v. Turner*, 777 F.2d 307 (8th Cir. 1985), be reversed.

INTEREST OF AMICI

The individual states appearing as Amici are responsible for the supervision and control of all inmates incarcerated in penal institutions within their respective states. Many of these states are under the jurisdiction of the Eighth Circuit Court of Appeals. A primary concern of the Amici is maintaining the security, order and discipline in each of their penal institutions. These states share the belief that virtually unrestricted correspondence between inmates jeopardizes the lives of inmates and employees and the security and order of the institution.

The Amici respectfully request leave of the Court to file this brief in support of the Petitioner in this case because of the constitutional significance of the issues and because of the impact which any decision will have upon the administration of state penal institutions.

SUMMARY OF THE ARGUMENT

Inmates retain only those First Amendment rights which are not inconsistent with their status as prisoners or with the legitimate penological objectives of the correctional system. Generally, constitutional challenges to prison regulations based on the First Amendment are subject to rational basis standards. If the restriction on First Amendment rights is rationally related to an important or substantial state interest and the restriction is not an exaggerated response to that interest, the restriction does not violate the First Amendment rights of inmates. In one instance, the strict scrutiny standard has been applied to a prison regulation which affected the First Amendment rights of non-incarcerated individuals. In that case, the Court held that to withstand a First Amendment attack, the regulation must

further an important or substantial governmental interest and the limitation of First Amendment freedoms must be no greater than necessary or essential to protect the particular governmental interest involved.

In this case, a strict scrutiny standard was applied to a prison regulation which prohibited correspondence between inmates who were not members of an immediate family. The extension of the strict scrutiny standard to inmate-to-inmate correspondence does not accord due deference to prison officials in dealing with security concerns created by such correspondence. This lack of deference severely undercuts prison officials' ability to protect inmates who have provided confidential information in prison disciplinary actions or who have testified on behalf of the state against a co-defendant in the criminal trial. It also lessens the impact of separating inmates who have been disciplinary problems or who have created security problems at a single institution. Further, it creates the possibility that contemporaneous disturbances or escape attempts could be planned at separate institutions, thereby lessening the ability of prison officials to react to such occurrences.

This Court is urged to adopt a standard for inmate-to-inmate correspondence which allows prison officials the discretion which is necessary to allow the use of their professional expertise in dealing with security concerns. Accordingly, the Amici request that the constitutionality of restrictions on inmate-to-inmate correspondence be determined under the rational basis standard.

ARGUMENT

I. THE LOWER COURTS ERRED IN FINDING THAT A STRICT SCRUTINY STANDARD, RATHER THAN A RATIONAL BASIS STANDARD, WAS APPLICABLE TO A PRISON RULE WHICH PROHIBITED CORRESPONDENCE BETWEEN INMATES WHO WERE NOT MEMBERS OF AN IMMEDIATE FAMILY.

The United States District Court for the Western District of Missouri held that the strict scrutiny standard which is set forth in *Procunier v. Martinez*, 416 U.S. 393, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974), rather than the rational basis standard as set forth in *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974), was applicable to a prison rule which restricted correspondence between inmates to correspondence between members of an immediate family The United States Court of Appeals for the Eighth Circuit affirmed. In so holding, the Court of Appeals rejected the rational basis standard because inmate-to-inmate correspondence did not involve presumptively dangerous activity like a prisoners' union in *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977). The Court also held that the restriction in question was not a time, place or manner regulation which allowed alternative means of communication, as in *Pell v. Procunier.*

The Court of Appeals decision misreads *Jones v. North Carolina Prisoners' Labor Union, Inc.* In *Jones*, the Court held that prison regulations which prohibited inmates from soliciting other inmates to join the union, barred all meetings of the union and prevented the delivery of packets of union publications which had been mailed in bulk for redistribution, did not violat the First Amendment. *Id.*, 433 U.S. at 131. The Court of Appeals distinguished the decision in *Jones* by reasoning that the prohibited union activities were presumptively dangerous. In refusing to apply the rational basis standard to the restriction

in this case, the Eighth Circuit summarily concluded that mail between two inmates in two different institutions physically separated by many miles was not presumptively dangerous.

The creation of the concept of presumptively dangerous activities by the Court of Appeals cannot be supported by the *Jones* decision. This Court's decision in *Jones* emphasized the need for deference to decisions by prison officials in security matters. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. at 126-128, 132-133, n. 9; *see, Vester v. Rogers*, No. 85-6639 (4th Cir., July 18, 1986). It seems beyond dispute that inmate-to-inmate correspondence does create a potential danger to the security and order of penal institutions even where the inmates are incarcerated in separate facilities.

Such correspondence may increase the likelihood of attack by allowing for contracts or threats on the lives or well-being of inmates to be communicated to other institutions. For example, inmates whose lives are endangered by inmates in one facility may be transferred to another insitution.[1] Such a transfer may be necessary as a result of cooperating with prison officials in disciplinary actions. Similarly, a co-defendant who has turned state's evidence is generally placed in an institution other than one in which the co-defendant has been placed. If the identity of a suspected informant or witness is communicated to inmates in another institution, the individual's life may be in jeopardy. Attacks on past informants may cause inmates to be hesitant to cooperate in the future. *Hewitt v. Helms*, 459 U.S. 460, 463, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983). Correspondence between inmates in these institutions may well be used as the means to transmit contracts on the lives of such inmates or to intimidate such inmates through threats.

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[1]In addition to intrastate transfers, inmates may be transferred to the Federal Bureau of Prisons pursuant to 18 U.S. § 5003 or to another state. Forty-two states are members of corrections compacts which allow for interstate transfer of inmates. *National Institute of Corrections Quarterly Summary*, 3rd Quarter, 1985, United States Department of Justice (Dec. 1985).

Transfers to other institutions which are used to separate inmates who have been disciplinary problems or who have created security problems at a single institution would be less effective. *See Olim v. Wakinekona*, 461 U.S. 238, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983); *Prison Gangs – Their Extent, Nature and Impact on Prisons*, U.S. Department of Justice (July 1985). Inmate-to-inmate correspondence may allow such inmates to give continued encouragement in support of disruptive activities.

Inmate-to-inmate correspondence might be used to immeasurably complicate a riot or escape situation. If disturbances could be planned to occur at two or more separate institutions at the same time, efforts of prison officials to quell the disturbance at any of the individual institutions would most certainly be hampered by the necessary division of resources. The same effect may occur as a result of simultaneous escape attempts. The interest in preserving the order and security of the institution is self-evident in these examples. *See Hudson v. Palmer*, 468 U.S. ____, 104 S.Ct. 3194, 82 L.Ed.2d 393, 403 (1984). As a result, the reasoning of the Court of Appeals is contrary to the express requirement of deference by *Jones* since the Court merely substituted its opinion for that of prison officials.

The Court of Appeals also reasoned that the rational basis standard was not applicable because the restrictions on inmate-to-inmate correspondence did not allow alternate means of communicating with inmates in other institutions, as in *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), and *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974). In support of this conclusion, the Court of Appeals looked to other methods of direct correspondence between inmates such as phone calls and noted that none were available. However, the Court failed to consider at least one method of indirect correspondence between inmates in different institutions which was available. A prison policy clearly can allow inmates to exchange names and addresses of their relatives. The prison policy would also allow the sending of letters by each

of these inmates to nonincarcerated relatives who then could have exchanged news about each of the inmates. In *Pell v. Procunier*, this Court noted just such an alternative avenue of communication between inmates and members of the press. *Pell v. Procunier*, 417 U.S. at 825. *See Vester v. Turner*, No. 85–6639, slip opinion at pp. 10-11 (4th Cir. July 18, 1986) (where a similar restriction was found to be a reasonable time, place and manner restriction because it was not an absolute denial of free speech). In *Pell*, the Court stated:

> More importantly, however, inmates have an unrestricted opportunity to communicate with the press or any other member of the public through their families, friends, clergy or attorneys who are permitted to visit them at the prison. Thus, this provides another alternative avenue of communication between prison inmates and persons outside the prison.
>
> We would find the availability of such alternatives unimpressive if they were submitted as justification for governmental restriction of personal communication among members of the general public. We have recognized, however, that "[t]he relationship of state prisoners and state officers who supervise their confinement is far more intimate than that of a state and a private citizen" and that the "internal problems of state prison involved issues . . . particularly within state authority and expertise. *Id.*

This alternative for indirect communication would alleviate many administrative problems which would be faced in monitoring direct inmate-to-inmate correspondence. Relatives outside the prison would be less likely to be knowledgeable of prison parlance and nicknames, and thus, the possibility of messages coded in such parlance would be substantially less. A non-incarcerated relative would be less likely to transmit contracts or threats on a inmate's life, or escape plans. Indirect communication is limited. However, this limitation is necessary to protect

the security needs of institutions. It does allow some means of communication while furthering the security interests of the institution and alleviating some of the administrative burdens which would be created by a policy which would allow inmate-to-inmate correspondence as a general rule.

In *Vester v. Rogers*, the Fourth Circuit Court of Appeals addressed the proper standard of review for a prison regulation prohibiting inmate-to-inmate correspondence without permission of the wardens of the respective institutions. The court expressly rejected the reasoning of the Eighth Circuit in this case as unpersuasive. *Vester v. Rogers*, No. 85-6639, slip opinion at p. 5. The court stated that the strict scrutiny standard applied only when a regulation intrudes upon the First Amendment rights of non-prisoners or constitutes a total denial of an inmates' right to free speech. *Id.*, at 9. The Court noted the need for deference to prison officials in addressing prison security concerns, *id.* at 8, and the alternate methods of indirect communication which are available to inmates. *Id.*, at 11. As a result, the Court examined the regulation under the rational basis test of *Pell*.

For these reasons, the lower courts erred in finding that the strict scrutiny standard of *Procunier v. Martinez* was applicable to the prison policy which prohibited correspondence between inmates who were not members of an immediate family, and the rational basis standard set forth in *Pell v. Procunier*, *Bell v. Wolfish*, and *Jones v. North Carolina Prisoners' Union, Inc.*, should have been applied.

CONCLUSION

For all of the above reasons, this Court is respectfully requested to reverse the decision of the United States Court of Appeals for the Eighth Circuit which applied the strict scrutiny standard of *Procunier v. Martinez* to a prison regulation prohibiting correspondence between inmates who are not members of an immediate family.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of August, 1986, I did place the following "Brief for Individual States As Amici Curiae in Support of the Petitioner" in the United States mail, postage prepaid, and properly addressed as follows:

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